TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 138

JOSEPH F. MILLER, PETITIONER

vs.

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 6, 1932
CERTIORARI GRANTED DECEMBER 5, 1932

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 138

JOSEPH F. MILLER, PETITIONER

vs.

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

I

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Fifth Circuit	1	1
Caption [omitted in printing]	1	1
Record from D. C. U. S., Northern Georgia	4	1
Petition for writ of habeas corpus	4	1
Pauper's affidavit	6	2
Exhibit A.—An extract from the minutes	7	2
Exhibit B.—An extract from the minutes	8	3
Exhibit C.—Docket entries	9	3
Order for writ in forma pauperis	10	4
Order dismissing writ and remanding petitioner to custody	10	4
Response	11	4
Notice of appeal	12	5
Order allowing appeal in forma pauperis	12	5
Assignment of errors	13	5
Affidavit of pauper	13	6
Praecipe for transcript of record	14	6
Citation, note re	15	6
Clerk's certificate [omitted in printing]	15	6
Argument and submission [omitted in printing]	16	6
Opinion of the court	17	7
Judgment	19	8
Petition for rehearing	20	8
Order denying rehearing	22	10
Clerk's certificate [omitted in printing]	23	10
Order allowing certiorari		11

1 [Caption omitted.]

2–3 [Not printed.]

4 In United States District Court, Northern District of Georgia, Atlanta Division

UNITED STATES OF AMERICA, IN THE RELATION OF JOSEPH F. MILLER, relator

vs.

ARTHUR C. ADERHOLD, AS WARDEN, UNITED STATES PENITENTIARY, Atlanta, Georgia, respondent

Petitioner for writ of habeas corpus

To the Hon. UNITED STATES DISTRICT JUDGE FOR THE DISTRICT AFORESAID:

Petitioner for his petition herein to this honorable court respectfully shows and alleges:

1. He is a citizen of the United States, and of the city of New York.

2. He is at present imprisoned involuntarily by Arthur C. Aderhold as warden of the United States penitentiary at Atlanta, Georgia, and within the jurisdiction of this court, and said imprisonment petitioner claims on information and belief to be illegal.

3. The pretext for the detention is a commitment issued out of the United States District Court for the Southern District of New York on June 17, 1931, committing this petitioner to four years in the penitentiary upon a judgment of said court entered the 17th day of June, 1931; and it is respectfully submitted that this judgment was illegal and void for lack of jurisdiction of the sentencing in court for the following reasons, to wit:

5 The petitioner, after having been indicted for stealing from the United States mails on or about August 27th, 1928, was arraigned in said court on September 10th, 1930, and plead guilty, whereupon sentence was suspended and an order entered discharging him from the custody of the United States marshal. Copy of this order is attached hereto and made a part hereof, marked "Exhibit A."

On June 17, 1931, the petitioner was rearrested, brought before the court, and without a hearing and without the advice of counsel was resentenced by another judge, and the commitment referred to was prepared and delivered to the United States marshal. Copy of the commitment is attached hereto and made a part hereof, marked "Exhibit B."

A copy of the docket entries of the United States District Court for the Southern District of New York is attached hereto and made a part hereof, marked "Exhibit C."

4. A motion to vacate the alleged illegal sentence was made in the United States District Court for the Southern District of New York on October 27th, 1931, before Judge Goddard who passed the sentence alleged to be illegal, and the said judge denied the motion.

The petition is made because of counsel's doubt of appealability of the order denying the motion to set aside the judgment, after the time for appeal from that judgment had already expired.

Therefore, petitioner prays that a writ of habeus corpus issue out of this court commanding the respondent herein to bring this petitioner into court and for his speedy discharge if it be found that his detention be illegal.

JOSEPH F. MILLER,
Petitioner.

6 STATE OF GEORGIA,
County of Fulton, ss:

Joseph F. Miller, being duly sworn, deposes and says:

That he is the petitioner herein; that this petition is true to the best of his knowledge, information, and belief, and in substance.

Petitioner further says that he is a citizen of the United States and of the State of New York; that by reason of poverty, he is unable to pay the clerk's and marshal's fees on this application, and that he is advised and verily believes that he has a good cause of action for the relief requested in the foregoing petition.

Wherefore, he asks this court for leave to proceed herein as a poor person under the provisions of title 28, United States court.

JOSEPH F. MILLER.

Sworn to before me this 10th day of November, 1931.

[NOTARIAL SEAL.] H. F. FRICK,
Notary Public, Georgia, Fulton Co.

Commission expires June 29, 1935.

7 *Exhibit A to petition*

At a stated term of the United States District Court for the Southern District of New York, held at the United States court room in the borough of Manhattan, city of New York, on Dec. 10, 1930

Present: The Honorable Frank J. Coleman, judge.

The United States vs. Joseph F. Miller. C58–392. U. S. Criminal Code, Sec. —. Stealing from U. S. mails

Deft. pleads guilty; sentence suspended.

Ordered that the prisoner be discharged from the custody of the U. S. marshal.

An extract from the minutes.

[SEAL.] (Signed) CHARLES WEISER,
Clerk.

8 *Exhibit B to petition*

At a stated term of the United States District Court for the Southern District of New York, held at the United States court room in the borough of Manhattan, city of New York, on Jun. 17, 1931

Present: The honorable Henry W. Goddard, judge.

The United States vs. Joseph F. Miller. C58-392. U. S. Criminal Code, Sec. 194 U. S. C. C. Stealing from the U. S. mails

On motion of the United States attorney, ordered sentenced.

The court thereupon proceeded to pass judgment, and sentenced the prisoner to be imprisoned for a term of four (4) years. Sentence to be executed at the U. S. penitentiary, Atlanta, Ga. Sentenced to date from June 17, 1931.

An extract from the minutes.

[SEAL.] (Signed) CHARLES WEISER,
Clerk.

9 *Exhibit C to petition*

Title of case: The United States vs. Joseph F. Miller. Violation of 392. Stealing from the U. S. Mails. Sec. 194, U. S. C. C.
Attorney for defendant: ——— ———.

Date	Proceedings	No. of words	Clerk's fees	
			Pltf.	Defendt.
Mo. Day Year				
Aug. 27, 1928	Filed indictment		5. 00	
Sep. 4, 1928	Adjd. to Sept. 10th, 1928	5		
Mar. 13, 1930	Filed bench warrant with marshal's return; def. not apprehended. 3/13/30.			
Dec. 10, 1930	Pleads guilty; sentence suspd. Coleman, J.			
Dec. 15, 1930	Filed order of removal from northern district of New York to southern district of New York.			
Dec. 15, 1930	Filed bench warrant			
Dec. 15, 1930	" discharge from custody of U. S. marshal.			
June 17, 1931	P. G.; sentenced to four years U. S. penitentiary, Atlanta, Ga., Goddard, J.			
June 17, 1931	Issued commitment & duplicate			
July 27, 1931	File commitment & entered return. Defendant delivered to the U. S. pen., Atla., Ga. 7/13/31.			

10 In United States District Court

Order for writ to issue in forma pauperis

Filed Nov. 12, 1931

Read and considered. Let the writ issue in forma pauperis, returnable before me at Atlanta, Georgia, on Friday, November 13th, 1931, at 10.00 o'clock a. m.

This November 12th, 1931.

E. MARVIN UNDERWOOD,
U. S. Judge.

In United States District Court

Order dismissing writ of habeas corpus and remanding petitioner to custody

Filed Dec. 12, 1931

The above-entitled proceeding coming on for hearing before me, and after hearing thereon, it is considered, ordered, and adjudged that said writ of habeas corpus be and the same is hereby dismissed, and it is further ordered that the petitioner be remanded to the custody of respondent.

This 12th day of December, 1931.

E. MARVIN UNDERWOOD,
United States Judge.

11 In United States District Court

Response

Now comes the respondent in the above-entitled proceeding and in obedience to said writ, produces the body of the petitioner at the time and place directed therein, and for cause of the detention respectfully shows that he holds the petitioner under and by virtue of a commitment issued by the District Court of the United States for the Southern District of New York, dated the 17th day of June, 1931, a copy of which is hereto attached and made a part of this response.

Wherefore, having fully answered, respondent prays the judgment of the court in the premises.

HAL LINDSAY,
Assistant United States Attorney,
Attorney for Respondent.

Duly sworn to by A. C. Aderhold. Jurat omitted in printing.
(NOTE: Exhibit omitted. Same appears on page 8.)

12 In United States District Court

Notice of appeal

Please take notice that the above-named relator hereby appeals from the order of the court discharging the writ of habeas corpus previously granted and every part of such order entered the 12th day of December, 1931, to the United States Circuit Court of Appeals for the Fifth Circuit.

Dated at Atlanta, Ga., this 24th day of December, 1931.

JOSEPH F. MILLER,
Relator-Appellant.

Office and P. O. address: United States penitentiary, Atlanta, Ga.

To: The clerk of this court.
The United States attorney for this district.

In United States District Court

Order allowing appeal

Filed Jan. 1, 1932

The appeal so taken is hereby allowed and appellant is allowed to prosecute said appeal in forma pauperis.

Atlanta, Ga., January 1st, 1932.

E. MARVIN UNDERWOOD,
U. S. Judge.

13 In United States District Court

Assignment of errors

Filed Jan. 1, 1932

The court erred in discharging the writ of habeas corpus because the sentencing court lacked jurisdiction to sentence the relator to imprisonment after his discharge by Judge Coleman.

The court erred in discharging the writ of habeas corpus because the relator was illegally detained, and the writ should have been sustained.

JOSEPH F. MILLER,
Relator-Appellant.

In United States District Court

Affidavit of pauper

Filed Jan. 1, 1932

COUNTY OF FULTON,
State of Ga., ss:

Joseph F. Miller, being duly sworn according to law deposes and says that he is the petitioner in the above-entitled action; that he is a citizen of the United States, and that because of his poverty he is unable to pay the costs of said action or to give security therefor.

JOSEPH F. MILLER.

Sworn to and subscribed before me this 21st day of December, 1931.

[NOTARIAL SEAL.] FRANK S. GRAHAM,
Notary Public.

14 In United States District Court

Praecipe for transcript of record

Filed Jan. 1, 1932

The clerk will prepare the record, as follows:

1. Petition for habeas corpus.
2. Return of respondent, or motion to dismiss.
3. Order denying writ of habeas corpus, and opinion if any.
4. Notice of appeal, assignment of errors, affidavit of poverty, and allowance of appeal and of proceeding in forma pauperis.
5. If customary in this district, a writ of habeas corpus with return endorsed thereon, and citation with admission of service; or in lieu thereof suitable mention in the record.
6. Such other and further papers as the respondent should designate.

The clerk will kindly file the record with the clerk of the United States circuit court, together with the appearance of the appellant.

Dated at Atlanta, Ga., December 24th, 1931.

JOSEPH F. MILLER,
Appellant in person.

15 NOTE RE CITATION: Original citation omitted from the record, the original thereof being on file in the office of the clerk of the U. S. Circuit Court of Appeals.

[Clerk's certificate to foregoing transcript omitted in printing.]

16 [Minute entry of argument and submission, Feb. 17, 1932, omitted in printing.]

17 In United States Circuit Court of Appeals for the Fifth Circuit

No. 6470

JOSEPH F. MILLER, APPELLANT

versus

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, Georgia, appellee

in forma pauperis

Appeal from the District Court of the United States for the Northern District of Georgia

(February 20, 1932)

Before Bryan, Foster, and Walker, circuit judges

Opinion of the court

Filed February 20, 1932

By the court. Appellant pleaded guilty to an indictment charging him with stealing mail matter, in violation of §194 of the Criminal Code, 18 U.S.C.A. §317. The district judge who received the plea suspended sentence indefinitely, but some six months later another judge of the same district court imposed a sentence of four years in the Atlanta Penitentiary. This appeal is taken from an order dismissing a writ of habeas corpus previously issued, and remanding appellant to custody.

18 The order indefinitely and unconditionally suspending the imposition of sentence was void. Ex parte United States, 242 U. S. 27. A judge of the trial court had authority, notwithstanding the attempted suspension, to impose sentence and to order that appellant be committed to the penitentiary. United States, ex rel. Campbell v. Bishop, 47 F. (2) 95.

The judgment is affirmed.

A true copy.

Teste:

_____,

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

19 In United States Circuit Court of Appeals

No. 6470

JOSEPH F. MILLER

versus

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, Georgia

Judgment

Feb. 20, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court in this cause be, and the same is hereby affirmed.

20 *Petition for rehearing*

Filed March 9th, 1932

In United States Circuit Court of Appeals for the Fifth Circuit

[File endorsements omitted.]
[Title omitted.]

Application for rehearing and/or Motion to Certify Questions to the Supreme Court of the United States

(Filed March 9, 1932)

The appellant hereby applies for rehearing upon the ground that in its opinion of February 20th, 1932, this honorable court seems to have overlooked that the case of Ex parte United States, 242 U. S. 27, was decided in 1916, nine years before the enactment of section 724 of title 18, U. S. C. A., which specifically gives the district courts power which in 1916 they did not have," to suspend the imposition or execution of sentence."

Since the district judges now have the power to suspend the imposition of sentence, the order indefinitely and unconditionally suspending the imposition of sentence was valid, and thereupon the court lost jurisdiction of the defendant. Grundel vs. People, 33 Colo. 191, 192; 79 P. 1022.

The case of Campbell v. Bishop, 47 Fed. 2nd 95, is also not in point. In that case a definite sentence was imposed, but execution was suspended, and upon violation of parole terms, suspension of execution was revoked.

Unless this court wishes to hold that a district court may not lawfully suspend imposition of sentence without placing the defendant upon probation—a holding wholly unwarranted by the langauge of the statutes—its previous opinion and decision herein should be recalled.

21 Section 724 of title 18 is unambiguous. That section was enacted to permit Federal judges to suspend sentence. We repeat from appellant's original brief:

"It is true that before the enactment of section 724 mandamus proceedings, if brought in proper time, would have resulted in an order compelling the judge to revoke the invalid suspension and impose sentence, but, since the enactment of the statute, the court had an absolute right to suspend sentence without the imposition of terms or conditions. No mandamus proceedings would lie against him. Such suspension without the imposition of terms or conditions operated as a complete discharge."

The case at bar is of great importance to the appellant, but of still greater importance to the entire Federal judiciary, as was the case of United States vs. Benz, 51 S. Ct. 113, which reached the Supreme Court on a very similar question on certification from the Third Circuit Court.

With the importance of the issue, and the uncertainty of certiorari proceedings in view, it is most respectfully suggested and moved that upon this rehearing this court certify the question involved to the Supreme Court for aid in its determination. The following question is respectfully suggested:

1. Has a United States district judge power indefinitely and unconditionally to suspend the imposition of a sentence upon conviction of defendant for a crime?

2. If the answer is "yes," does the court thereafter retain jurisdiction to recall the convicted person and to impose a definite term?

All of which is respectfully submitted.

JOSEPH F. MILLER,
Appellant in person.

HORACE G. MARKS,
WILLIAM MATTHEWS
Of the New York Bar,
Of counsel for appellant.

22 In United States Circuit Court of Appeals

[Title omitted.]

Order denying rehearing

(March 11, 1932)

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby denied.

23 [Clerk's certificate to foregoing transcript omitted in printing.]

[Endorsement on cover:] Enter Joseph F. Miller, pro se. In forma pauperis. File No. 36,835. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 138. Joseph F. Miller, petitioner, vs. A. C. Aderhold, warden, United States penitentiary, Atlanta, Georgia. Petition for a writ of certiorari and exhibit thereto. Filed June 6, 1932. File No. 36835.

U. S. GOVERNMENT PRINTING OFFICE 1932

Supreme Court of the United States

Order allowing certiorari

Filed December 5, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is assigned for argument on Monday, January 9th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.